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No. 91

In the Supreme Court of the United States

OCTOBER TERM, 1960

UNITED STATES OF AMERICA, APPELLANT

v.

ROY FRUEHAUF, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE SOUTHERN DISTRICT OF NEW YORK

BRIEF FOR THE UNITED STATES IN OPPOSITION TO MOTIONS TO AFFIRM

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Appellees offer two principal grounds in support of their motions to affirm.[1] They argue (1) that the words "pay or deliver," as used in Section 302(a) of the Labor Management Relations Act of 1947, 61 Stat. 157, 29 U.S.C. 186 ("It shall be unlawful for any employer to pay or deliver * * * any money or other thing of value to any representative * * *") do not fairly encompass a loan of money, or at least do not give fair warning that a loan transaction is for-

[1] One motion, referred to herein as "Fruehauf", has been filed by appellees Roy Fruehauf, Burge Seymour, Associated Transport, Inc., and the Brown Equipment and Manufacturing Co. Separate motions have been filed by appellees Fruehauf Trailer Co. and Dave Beck. The latter's motion merely adopts the motions of the other appellees.

bidden (Fruehauf, pp. 4–10; Fruehauf Trailer Co., pp. 6–11); and (2) that the legislative history of Section 302, when considered with the amendatory action taken by Congress in 1959 (which, *inter alia,* inserted the word "lend" in Section 302), shows that Congress did not intend to reach loans in the prior version of Section 302 (Fruehauf, pp. 10–17; Fruehauf Trailer Co., pp. 12–15). Neither contention is sound.

1. (a) In this, as in all cases which turn on the meaning of a word, resort must first be had to the language of the statute in which it is used. *Adams Express Company* v. *Kentucky,* 238 U.S. 190, 199. We pointed out in the jurisdictional statement that, in enacting Section 302, Congress recognized that employers and representatives gather at the bargaining table primarily to decide the rights of employees who are not physically present, and that it sought to insure that employers and representatives would bargain honestly and at arms length by forbidding all financial transactions between them other than the five classifications set forth in the statute itself.[2] To ban all payments except those expressly authorized Congress used broad but simple language—"It shall be unlawful for any employer to pay or deliver * * * any money or other thing of value to any representative of any of his employees * * *." Section 302, *supra.* Plainly that all-inclusive language is in terms broad enough to cover a loan of money. Since such a construction is consonant with the Congressional

[2] Appellees do not and can not contend that the loan of money out of which this prosecution arose comes within one of those exempted classifications.

purpose to prevent corruption of the bargaining process, the statute should be so read.

The phrase "deliver * * * any money or other thing of value" in its usual sense covers a loan of money. By dictionary definition, when used in a context appropriate to this case, "deliver" means "to give or transfer" something; "lend" means to allow the use of something, on the condition that it be returned. Webster's New International Dictionary (2d ed., 1958, Unabridged) pp. 693, 1415. Although every loan contemplates a transfer or delivery of something having specific identity (even though temporary), of course not all deliveries or transfers of money are loans. Appellees, in arguing that a delivery does not include a loan (Fruehauf, p. 5), are obviously mistaken in asserting that the word "deliver" is narrower than the term "lend" in ordinary meaning and, accordingly, that "deliver" is not wide enough to encompass "lend."

The five carefuly drawn exceptions in Section 302(c)[3] further indicate that, had Congress intended to except loan transactions from the prohibition against the "pay[ment] or deliver[y]" of money to a representative, it would have specifically done so. See *Benanti* v. *United States*, 355 U.S. 96, 105.[4]

[3] Those exceptions are: (1) money paid by an employer to a "representative who is an employee" as compensation for his services as an employee; (2) payments made in satisfaction of a judgment or award; (3) payments for goods purchased at the prevailing market price in the ordinary course of business; (4) "check-off" payments "in payment of membership dues in a labor organization"; and (5) payments to welfare funds administered jointly by the employers and employees.

[4] This Court's decision in *Arroyo* v. *United States*, 359 U.S. 419, is not pertinent to this case. There, the question was whether the payment to the representative was a payment to a

(b) The considerations discussed above largely dispose of appellees' alternative contention that Section 302 is too vague to be read as prohibiting a loan transaction. While the legislative draftsmen might have chosen to use a number of words of specific content, rather than two broad inclusive words like "pay" and "deliver", a statute does not become invalid because more specific phraseology is possible. All that is required is that the language "conveys sufficiently definite warning as to the proscribed conduct when measured by common understanding and practices." *United States* v. *Petrillo*, 332 U.S. 1, 8. So measured, the language of Section 302 gives fair notice, in well-understood terms, that no payment or delivery of money or other thing of value is permitted unless specifically exempted from the operation of the statute. The section thus does not require the appellees to make as difficult a choice as that involved in many cases under legislation already upheld by this Court.[8]

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welfare fund and thus authorized under Section 302(c). This Court held that it was. No similar contention has been advanced by appellees in this case.

[8] *E.g.*, *Roth* v. *United States*, 354 U.S. 476, 491 (statute forbidding the mailing of material that is "obscene, lewd, lascivious, or filthy * * * or other publication of an indecent character"); *United States* v. *Harriss*, 347 U.S. 612 (statute applicable to anyone who solicits or collects money where the "principal purpose" of the person or the principal purpose of the solicitation or collection is to influence legislation by direct communication with legislators); *Boyce Motor Lines* v. *United States*, 342 U.S. 337 (regulation requiring the drivers of trucks carrying explosives to avoid "congested" routes "so far as practicable, and, where feasible"); *Dennis* v. *United States*, 341 U.S. 494 (statute forbidding any person to con-

2. In the jurisdictional statement, pp. 8–11, we argued that the amendment of Section 302 by Section 505 of the Labor-Management Reporting and Dis-

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spire "to knowingly or willfully advocate * * * or teach the duty, necessity, desirability, or propriety of overthrowing or destroying any government in the United States by force or violence * * *"); *Kovacs* v. *Cooper*, 336 U.S. 77 (prohibition against "loud and raucous" sound trucks); *United States* v. *Petrillo*, 332 U.S. 1 (statute prohibiting coercion of radio stations to employ persons "in excess of the number of employees needed * * * to perform actual services"); *Arrews* v. *United States*, 325 U.S. 91, and *Williams* v. *United States*, 341 U.S. 97 (prohibition against depriving any person "of any rights, privileges, or immunities secured or protected by the Constitution and laws of the United States"); *Chaplinsky* v. *New Hampshire*, 315 U.S. 568 ("any offensive, derisive or annoying word"); *Gorin* v. *United States*, 312 U.S. 19 ("connected with" or "relating to" the national defense); *Old Dearborn Co.* v. *Seagram Corp.*, 299 U.S. 183 (statute exempting fair trade agreements from operation of other laws only if the fair traded article was in "fair and open" competition with other products); *United States* v. *Wurzbach*, 280 U.S. 396 (no officer or employee of the United States may solicit or receive a "contribution for any political purpose whatever" from any other such officer or employee); *Omaechevarria* v. *Idaho*, 246 U.S. 343 (pasturage of sheep forbidden if it would interfere with the "usual and customary" use of a cattle range); and *Nash* v. *United States*, 229 U.S. 373 (statute forbidding "[e]very contract, combination in the form of trust or otherwise, or conspiracy, in restraint of trade or commerce among the several States, or with foreign nations").

Nothing in *United States* v. *Mersky*, 361 U.S. 431, is inconsistent with the government's position in this case. In *Mersky*, this Court held that a customs regulation, on its face, left "the distinct impression that it was intended to protect and expedite the collection of customs duties", rather than to change the requirements as to the markings to be affixed to imported goods after importation (*id.*, at 440–441). Here, there is no question but that Section 302 is directed at the regulation of financial dealings between employers and representatives.

closure Act of 1959, 73 Stat. 537, specifically to cover loans does not show that loans were not prohibited by the prior language, since the amendment was intended by Congress to make explicit what was already implicit in the existing language. We recognized (p. 10) that there was material in the legislative history that "points in the other direction." Appellees rely heavily on such material. As we previously stated, however, that material does not establish that, in extending the prohibitions of Section 302(c) to middlemen, Congress was broadening the prohibited transactions to reach a category not previously covered, namely, the payment or delivery of money as a loan. Such a loan payment, we submit, was covered by Section 302(c) as originally enacted in 1947, and later expressions to the contrary cannot alter the meaning of the 1947 Act. See *Fogarty* v. *United States*, 340 U.S. 8, 13–14; *United States* v. *Mine Workers*, 330 U.S. 258, 281–282; *Commissioner* v. *Acker*, 361 U.S. 87.

CONCLUSION

For the foregoing reasons, and those set forth in the jurisdictional statement, it is respectfully submitted that the motions to affirm should be denied and that probable jurisdiction of the appeal should be noted.

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